PD-0560-18
COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
Transmitted 12/11/2018 12:56 PM
Accepted 12/11/2018 1:12 PM
DEANA WILLIAMSON
CLERK

No. PD-0560-18

TO THE COURT OF CRIMINAL APPEALS

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COURT OF CRIMINAL APPEALS
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OF THE STATE OF TEXAS

DONALD COUTHREN, II,

Appellant

v.

THE STATE OF TEXAS,

Appellee

Appeal from Brazos County
Cause No. 13-16-00543-CR

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STATE PROSECUTING ATTORNEY'S
AMICUS BRIEF

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TO THE COURT OF CRIMINAL APPEALS

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* * * * *

STATE PROSECUTING ATTORNEY'S AMICUS BRIEF[1]

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TO THE HONORABLE COURT OF CRIMINAL APPEALS:

Drunk driving always warrants a deadly weapon finding in felony cases because it is always dangerous to the driver. It is a manner capable of causing death or serious bodily injury *per se*. Though this Court rejected this argument in *Brister*

[1] As the State Prosecuting Attorney, there is no fee attached to this filing. TEX. R. APP. P. 11.

v. State, 449 S.W.3d 490, 495 (Tex. Crim. App. 2014), the State Prosecuting Attorney reurges it here because the Court did not address the rationale in support of her *per se* theory. *Cf.* TEX. R. APP. P. 47.1 (a court of appeals must address every issue necessary to the disposition of the appeal).

I. Vehicle as a Deadly Weapon Sufficiency Standard.

A deadly weapon is "anything that in the manner of its actual or intended use is capable of causing death or serious bodily injury." TEX. PENAL CODE § 1.07(a)(17)(B). Evidence supporting a deadly weapon finding must be viewed in the light most favorable to the State to determine whether a rational factfinder could have found beyond a reasonable doubt that the vehicle was used or exhibited as a deadly weapon. *Cates v. State*, 102 S.W.3d 735, 738 (Tex. Crim. App. 2003). To sustain a deadly weapon finding in a DWI case, the evidence must establish that the vehicle was driven in a manner that was capable of causing death or serious bodily injury during the offense. *Mann v. State*, 13 S.W.3d 89, 92 (Tex. Crim. App. 2000). This standard sets forth two important components of proof—"manner" and "capability."

1. "Manner."

In *Sierra v. State*, this Court observed that "manner" of use has not been specifically defined but that, historically, evidence of dangerous or reckless driving has satisfied the requirement. 280 S.W.3d 250, 255 (Tex. Crim. App. 2009).

Considering past cases addressing "manner"—*Tyra v. State*,[2] *Mann v. State*,[3] *Cates v. State*,[4] and *Drichas v. State*,[5]—the Court observed:

> in *Tyra* . . . , we characterized Tyra's driving as reckless 'enough to endanger the lives of other people' and said that Tyra was 'too drunk to control the vehicle.' And in *Mann*, . . . the evidence showed that Mann 'almost hit another vehicle head-on when his vehicle crossed the center lane.' Next, in *Cates*, we reversed the court of appeals'[] holding that the evidence was legally sufficient to sustain the deadly weapon finding because there was no evidence that Cates drove the truck in a deadly or dangerous manner during the offense of failure to stop and render aid. Finally, in *Drichas*, we observed that Drichas, in the course of evading detention with a vehicle, led law enforcement officers on a fifteen-mile high-speed chase during which he 'disregarded traffic signs and signals, drove erratically, wove between lanes and within lanes, turned abruptly into a construction zone, . . . and drove down the wrong side on the highway.' Affirming the deadly weapon finding in that case, we said that Drichas's 'manner of using his truck posed a danger to pursuing officers and other motorists that was more than simply hypothetical.'

Sierra, 280 S.W.3d at 255 (internal citations omitted).[6]

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[2] 897 S.W.2d 769, 799 (Tex. Crim. App. 1995).

[3] 13 S.W.3d at 92.

[4] 102 S.W.3d at 738-39.

[5] 175 S.W.3d 795, 797-98 (Tex. Crim. App. 2005).

[6] Because Sierra's speed and failure to control his vehicle established dangerous and reckless driving, the Court did not need to address the State's argument that the fact of driving while intoxicated, on its own, always satisfies the "manner" requirement. *Id*. at 256.

2. "Capability."

With regard to "capability," the Court has said that others must have been endangered; a hypothetical potential for danger if others had been present is insufficient. *Cates*, 102 S.W.3d at 738. Actual endangerment, however, does not require others, including pursuing officers, to be "in a zone of danger," take evasive action, or require the suspect to intentionally strike another vehicle. *Drichas*, 175 S.W.3d at 799. "The volume of traffic . . . is relevant only if no traffic exists." *Id*.

II. Analysis

1. Deadly Weapon *per se* in all felony DWI cases: A matter of prosecutorial discretion.

A. Danger *per se*.

Driving while intoxicated, as defined by Penal Code Section 49.04,[7] is one of the most dangerous manners in which a person can operate a motor vehicle. Going back almost thirty years ago, the United States Supreme Court recognized this and its impact on our society at large:

> No one can seriously dispute the magnitude of the drunken driving problem or the States' interest in eradicating it. Media reports of alcohol-related death and mutilation on the Nation's roads are legion. The anecdotal is confirmed by the statistical. 'Drunk drivers cause an annual death toll of over 25,000 and in the same time span cause nearly

[7] *See also* TEX. PENAL CODE § 49.01(2) (impairment and *per se* theories of intoxication).

> one million personal injuries and more than five billion dollars in property damage.' For decades, this Court has 'repeatedly lamented the tragedy.'

Michigan Department of State Police v. Sitz, 496 U.S. 444, 451 (1990) (citations omitted). And in 2013, the Court acknowledged that, even though some progress has been made, "drunk driving continues to exact a terrible toll on our society." *Missouri v. McNeely*, 569 U.S. 141, 160 (2013).

B. Statistical overview of fatal crashes involving intoxicated driving.

According to the National Highway Traffic Safety Administration, in 2017, 10,874 people were killed in alcohol-impaired driving crashes in the United States.[8] In 2017, Texas had the highest number of alcohol-impaired driving fatalities—by a large margin.[9] Of the 3,722 traffic fatalities in Texas, 2,458 of those involved alcohol-impaired driving.[10]

The Texas Department of Transportation provides a rural and urban break down of the number of driving under the influence fatal crashes and the number of

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[8] U.S. Dept. of Transportation, National Highway Traffic Safety Administration, Traffic Safety Fact, 2017 Data, *available at* https://crashstats.nhtsa.dot.gov/Api/Public/ViewPublication/812231.

[9] *Id*. (.08 BAC 1,468 + .15 BAC 990 = 2,458); *compare with id.* (California (.08 BAC 1,120 + .15 BAC 721 = 1,841)).

[10] *Id*.

persons affected by them in 2017:[11]

	Number of Crashes	Number of Persons
Rural Fatal	1,684	1,950
Urban Fatal	451	469

C. The impairing effects of alcohol are indisputable.

Moreover, a blood alcohol level of .08 adversely affects a person's faculties. The Center for Disease Control lists the following: poor muscle coordination (e.g., balance speech, vision reaction time, and hearing); difficulty detecting danger; and impairment on judgment, self-control, reasoning, and memory.[12] And the predictable effects of a .08 BAC level on driving include: "[compromised] concentration, short-term memory loss, [impaired] speed control, reduced information processing capability (*e.g.*, signal detection, visual search), and impaired perception."[13]

The Texas Legislature has determined that driving with a BAC level of .08, the legal threshold for intoxication, is *per se* dangerous and reckless. *See* TEX. PENAL

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[11] TX Dept. of Transportation, 2017 Total and DUI (Alcohol) Fatal and Injury Crashes Comparison Chart, *available at* http://ftp.dot.state.tx.us/pub/txdot-info/trf/crash_statistics/2017/38.pdf.

[12] Center for Disease Control Information Table on the effects of BAC levels, *available at* https://www.cdc.gov/Motorvehiclesafety/pdf/BAC-a.pdf.

[13] *Id*.

CODE §§ 49.01(2)(B), 49.04. Similarly, driving while not having the normal use of mental or physical faculties due to alcohol, drugs, or a combination of both is also *per se* dangerous and reckless. Therefore, it should be unnecessary to require demonstrative evidence of discernibly dangerous or reckless driving—such as that used to support reasonable suspicion of DWI—to sustain the "manner" component for a deadly weapon finding in felony DWI cases.

D. Nationally, most fatalities are to drivers.

Turning to "capability," as noted above, the Court has always assessed it in terms of harm to "others" when deciding whether there has been endangerment. *See Sierra*, 280 S.W.3d at 255; *Williams v. State*, 946 S.W.2d 432, 435-36 (Tex. Crim. App. 1997). But "capability" should not be limited to "others." Single-car-driver fatalities are commonplace. Drivers with a BAC of .08 or more represent the majority of fatalities in alcohol-impaired crashes.[14] Out of the 10,874 fatalities in 2017 nationally, 6,618 were drivers.[15] While the majority of driver fatalities in Texas are not attributed to those with a .08 or higher, it is still a large portion—506 of 1,346

[14] U.S. Dept. of Transp., National Highway Traffic Safety Administration, Traffic Safety Facts, 2017 Data, *available at* https://crashstats.nhtsa.dot.gov/Api/Public/ViewPublication/812630.

[15] *Id*. 1,492 were passengers, 1,583 were occupants in other vehicles, and 1,181 were non-occupants. *Id*.

drivers killed had a .08 or over BAC in 2017.[16]

"Deadly weapon" includes "anything that in the manner of its use or intended use is capable of causing death or serious bodily injury." TEX. PENAL CODE § 1.07(a)(17)(B). Thus, "capable of causing death or serious bodily injury" is not limited to a person other than the driver. This understanding of "capability" is reasonable. *See Boykin v. State*, 818 S.W.2d 782, 785-86 (Tex. Crim. App. 1991) (courts are prohibited from looking beyond the plain text unless it is ambiguous or its plain meaning would lead to an absurd result that the Legislature could not have intended). Given the likelihood that the driver will die or be seriously injured in an alcohol-impaired crash, it is no stretch to conclude that the Legislature intended to allow for the possibility of an additional negative consequence[17] for drivers who have reached the felony DWI level. *See Mann v. State*, 58 S.W.3d 132, 133 n.1 (Tex. Crim. App. 2001) ("A deadly weapon finding limits a defendant's eligibility for community supervision and parole.").

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[16] Texas Dept. of Transp., 2017 Total and DUI (Alcohol) Fatal and Injury Crashes Comparison Chart, *available at* http://ftp.dot.state.tx.us/pub/txdot-info/trf/crash_statistics/2017/35.pdf.

[17] "A deadly-weapon finding may affect how the sentence is served, but it is not part of the sentence." *Ex parte Huskins*, 176 S.W.3d 818, 821 (Tex. Crim. App. 2005).

This would not be the only instance in which endangerment to the actor as well as others due to intoxication has been taken into consideration by the Legislature. The public intoxication statute accounts for both. A person commits the offense of public intoxication "if the person appears in a public place while intoxicated to the degree that the person may endanger the person or another." TEX. PENAL CODE § 49.02(a). Recognizing the driver as a person endangered is consistent with this view of the risks and potential victims of intoxication.

E. This is rational and justified, not absurd.

Holding that the State's burden to establish that a vehicle is a deadly weapon can be satisfied by the act of driving while intoxicated is not absurd. Initially, it is important to note that the State Prosecuting Attorney is not arguing that it should be relieved of its burden. Her position is that, like intoxication manslaughter and assault cases, proving the elements of DWI always satisfies the "manner" and "capability" deadly weapon elements. *See Tyra*, 897 S.W.2d at 799. This is not true of other felony vehicular offenses because the "manner" requirement, satisfied by driving while intoxicated, which is *per se* dangerous and reckless, is not an element in such cases.

Next, questioning why a deadly weapon finding is not authorized in misdemeanor DWI cases is easily explained. The Legislature has made the

determination to authorize deadly weapon findings only in felony cases because they are more serious offenses. *See Plummer v. State*, 410 S.W.3d 855, 861 (Tex. Crim. App. 2013) (Article "3g" "is intended to deter and punish those involved in serious violent felonies."). The distinction is rational. While the elements of the primary offense of DWI for misdemeanors and felonies are the same, felony DWIs are predicated on an person's status as a repeat offender or the act of driving with a child.[18] *See Mann*, 13 S.W.3d at 91-92 (rejecting the argument that a deadly weapon finding is not authorized in felony DWI cases because the primary offense is a misdemeanor DWI at its inception). Just as exempting misdemeanors as a class is not irrational, permitting deadly weapon findings only in felony cases is not absurd.

Finally, the State Prosecuting Attorney's argument is not made absurd because a deadly weapon finding in felony DWIs precludes a trial court from granting community supervision. Notably, the deadly weapon restriction applies to only one type of community supervision; jury recommended supervision is still available, *see* TEX. CODE CRIM. PROC. arts. 42A.055, 42A.056, and deferred adjudication community supervision is prohibited regardless of a deadly weapon finding. *See* TEX. CODE CRIM. PROC. art. 42A.102(b)(1). The current scheme accounts for prosecutorial discretion and the plea-bargaining process. It is within the discretion of prosecutors

[18] *See* TEX. PENAL CODE §§ 49.09(b), 49.045.

to affirmatively abandon a deadly weapon finding.[19] *See Guthrie-Nail v. State*, 506 S.W.3d 1, 6 (Tex. Crim. App. 2015) (recognizing that the judge and jury are authorized to decline to make an affirmative finding even when the offense included it as a *de facto* element); *see also Garland v. State*, 170 S.W.3d 107, 111 (Tex. Crim. App. 2005) (with the trial court's permission, the State can dismiss, waive, or abandon part of an indictment). A deadly weapon allegation, like a punishment enhancement, is often used as a tool to promote plea negotiations. *See Gutierrez v. State*, 108 S.W.3d 304, 308 (Tex. Crim. App. 2003) ("negotiated pleas are an integral and essential part of our system of criminal justice."). The threat of greater collateral punishment consequences is a sanctioned method of encouraging defendants to forgo a trial and plead guilty. *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978) ("by tolerating and encouraging the negotiation of pleas, this Court has necessarily accepted as constitutionally legitimate the simple reality that the prosecutor's interest

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[19] The Court has discussed this reality with respect to the death penalty when stating that prosecutorial discretion in seeking the death penalty is constitutional:

> The exercise of prosecutorial discretion in an individual case necessarily employs the consideration of various factors including but not limited to: the facts of the case itself, the heinousness of the crime, whether the victim was defenseless, the location of the crime, the callousness of the execution, the particular defendant's history, and the level of the defendant's participation in the offense.

Crutsinger v. State, 206 S.W.3d 607, 612 (Tex. Crim. App. 2006).

at the bargaining table is to persuade the defendant to forgo his right to plead not guilty."). There is a *quid pro quo*: the State agrees to a conviction for a lesser offense, a lower punishment, or reduced collateral consequences, depending on the available options and variables related to the case, and, in exchange, the defendant waives the right to a trial.[20] Here, because felony DWI is not on the list of "3g offenses,"[21] the Legislature has authorized prosecutors to use the possibility of judge-ordered supervision eligibility as a tool in the plea negotiation process. This is not absurd.

III. Conclusion

In every felony DWI case, a deadly weapon finding—*i.e.*, that the manner of the vehicle's use was capable of causing death or serious bodily injury—is supported by the evidence that proves DWI beyond a reasonable doubt. First, the "manner" requirement is satisfied because driving while intoxicated is *per se* dangerous and reckless and can therefore cause death or serious bodily injury. Second, "capability" is satisfied because, even in the absence of proof that others were endangered, the driver is endangered, and death or serious bodily injury to the driver could result.

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[20] *See generally, Perkins v. Court of Appeals for the Third Supreme Judicial Dist.*, 738 S.W.2d 276, 282 (Tex. Crim. App. 1987).

[21] TEX. CODE CRIM. PROC. art. 42A.054.

PRAYER FOR RELIEF

The State Prosecuting Attorney prays that this Court hold that a deadly weapon finding is applicable in all felony DWI cases.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that according to the WordPerfect word count tool this document contains 2,596 words, exclusive of the items excepted by TEX. R. APP. P. 9.4(i)(1).

/s/ Stacey M. Soule
State Prosecuting Attorney

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the State Prosecuting Attorney's Amicus Brief has been served on December 11, 2018, *via* email or certified electronic service provider to:

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